

- (7) repair and maintenance expenses; and
 - (8) administrative expenses.
- (c) Any costs that are properly identifiable as organization costs, or capitalizable as construction costs, shall be classified as such and excluded from start-up costs.
- (d) If a provider intends to prepare all portions of its entire facility at the same time, start-up costs for all portions of the facility shall be accumulated in a single deferred account and shall be amortized from the date of the first consumer admission. However, if a provider intends to prepare only portions of its facility (e.g., preparation of a floor or wing), start-up costs shall be capitalized and amortized separately. In either case, unless reimbursed as described in subparagraph (iv) of this paragraph, start-up costs shall be amortized over a period not to exceed 60 months from the date of the first consumer admission.
- (ii) Any cost of the sale, purchase, alteration, construction, rehabilitation and/or renovation of a physical plant or interest in real property manifested by cooperative shares shall be considered allowable up to the amount approved by the commissioner and the director of the Division of the Budget.
- (a) For any transaction resulting in a change of ownership, the valuation of the assets shall be limited to the lesser of the allowable acquisition cost of the assets to the first owner of record who has received Medicaid payment for the assets) in question on or after August 1, 1982, minus any paid depreciation i.e., seller's net book value) or the acquisition cost of the asset to the new owner.
 - (b) Costs including legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies (attributable to the negotiation or settlement of the sale or purchase of any capital asset by acquisition or merger) for which any payment has previously been made under Medicaid, shall not be allowable for reimbursement.
- (iii) A facility's annual rental payments for real property and maintenance charges associated with cooperative shares may be considered an allowable cost subject to the following conditions:

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- (a) The lease, or in the case of cooperative shares, the subscription agreement, is reviewed by and acceptable to OMRDD and any other State agency which must by law or regulation review and approve reimbursement rates.
- (b) The lease agreement must be considered an "arm's-length transaction" not involving an affiliate, controlling person, immediate family or principal stockholder. The "arm's-length transaction" requirement may be waived by the commissioner upon application for those corporations holding title to the intermediate care facility's physical plant, created pursuant to the Not-for-Profit Corporation Law with the approval of the commissioner.
- (c) For the purposes of this section, affiliate means:
 - (1) with respect to a partnership, each partner thereof;
 - (2) with respect to a corporation, each officer, director, principal stockholder and controlling person thereof;
 - (3) with respect to a natural person, each member of said person's immediate family, or each partnership and each partner of such person, or each corporation in which said person or any affiliate of said person is an officer, director, principal stockholder or controlling person.
- (d) For the purposes of this section, controlling person of any corporation, partnership or other entity means any person who by reason of a direct or indirect ownership interest whether of record or beneficial) has the ability, acting either alone or in concert with others with ownership interest, to direct or exert a controlling influence on the direction of the management policies of said corporation, partnership or other entity. Neither the commissioner, nor any employee of the OMRDD, nor any member of a local legislative body of a county or municipality, nor any county or municipal official except when acting as the administrator of a facility, shall by reason of his or her official position be deemed a controlling person of any corporation, partnership or other entity; nor shall any person who serves as an officer, administrator or other employee of any corporation, partnership or other entity, or as a member of a board of directors or trustees of any corporation, be deemed to be a controlling

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person of such corporation, partnership or other entity solely as a result of such position or his or her official actions in such position.

- (e) For the purposes of this section, immediate family means brother, sister, grandparent, grandchild, first cousin, aunt or uncle, spouse, parent or child of such person, whether such relationship arises by reason of birth, marriage or adoption.
 - (f) For the purposes of this section, principal stockholder of a corporation means any person who beneficially owns, holds or has the power to vote, 10 percent or more of any class of securities issued by said corporation.
 - (g) The rental amount is comparable to similar leases for properties with similar functions in the same geographic area.
 - (h) If the criteria in this paragraph are not met, reimbursement for lease costs will be the lower of lease costs or the amount determined in accordance with subparagraphs (iv) and (vii) of this paragraph.
 - (i) Existing leases shall be approved during the original term of the lease. However, lease options to renew shall not be exercised without review and approval of the parties listed in clause (a) of this subparagraph. Such review and decision shall occur more than 30 days before the last date the option may be exercised, the date of which the facility has notified OMRDD in accordance with clause (j) of this subparagraph.
 - (j) Effective January 1, 1983, requests for approval of lease renewals must be submitted whenever possible at least 120 days prior to the last date for the exercise of the lease renewal option.
- (iv) Depreciation shall be an allowable cost when based upon factors of historical costs and useful life of buildings, fixed equipment and/or capital improvements or acquisition of an interest in real property manifested by cooperative shares. For the purpose of this section:
- (a) Unless an exception is made by the commissioner, the useful life shall be the higher of the reported useful life or those from the Estimated Useful Lives of Depreciable Hospital Assets (1983 edition), published by the American Hospital Association, and

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available by writing to the American Hospital Association, 840 Lake Shore Drive, Chicago, IL 60611. In certain instances, a useful life that is based upon historical experience as shown by documentary evidence and approved by OMRDD may be allowed.

- (b) The depreciation method used shall be the straight-line method.
- (c) In the event that the historical cost of the facility cannot be adequately determined by the commissioner, an appraisal value shall be the basis for depreciation. The appraisal of the historical cost of assets shall produce a value approximating the cost of reproducing substantially identical assets of like type, quality, and quantity at a price level and in a bona fide market as of the date of acquisition. Such appraisal shall be conducted by an appraiser approved by OMRDD and pursuant to a method approved by OMRDD.
- (d) Notwithstanding subparagraph (f) (1) (ix) of this paragraph, in the case of any provider which has been notified by OMRDD on or after April 1, 1986 that there is a preliminary reservation of State aid funds for a capital grant pursuant to Mental Hygiene Law, section 41.189(c) section 41.23, the basis for computing depreciation on the facility which is the subject of the capital grant shall include the facility's depreciable project costs which were funded with such capital grant, provided that the provider is not receiving and does not have a commitment to receive HUD funding for the facility, and has not repaid the entire principal owed on the real property of the facility. If the depreciable project costs are adjusted after audit, the basis for computing depreciation on the facility will be changed to such adjusted depreciable project costs. Upon full repayment of principal, the basis for depreciation for the facility will cease to include the amount of the capital grant. Any provider which receives such a capital grant shall enter into certain assurances with the OMRDD whereby the provider agrees that:
 - (1) The difference between depreciation in the rate attributable to the facility's depreciable project costs (other than depreciation attributable to the provider's equity in the facility's real property at the time such property is put into use as a facility) and the principal

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which is repaid shall be deposited in a secure investment approved by the commissioner.

- (2) Withdrawals from such investment shall be made only for the purpose of repayment of indebtedness owed on the real property of the facility.
 - (3) Each withdrawal must be approved by the commissioner.
 - (4) If the provider ceases to operate the facility as an intermediate care facility for developmentally disabled, or as any facility certified by OMRDD, it will repay to the OMRDD the balance on deposit in the secure investment at the time of such cessation, including interest earned on the investment.
 - (5) Depreciable project costs shall mean those acquisition and construction costs of a facility which have been approved, either before or after audit, by the New York State Office of the State Comptroller or by OMRDD or by OMRDD's designee. Such costs shall not include the cost of land.
 - (6) HUD funding shall mean lower income housing assistance under section 8 of the United States Housing Act of 1937, as amended 42 U.S.C. section 1437(f) and/or a loan or loans pursuant to section 202 of the Housing Act of 1959, as amended 12 U.S.C. section 1701(q).
- (e) Notwithstanding subparagraph (f)(1)(ix) of this paragraph, any provider which has been notified by OMRDD before April 1, 1986 that there is a preliminary reservation of State aid funds for a capital grant pursuant to Mental Hygiene Law, section 41.18(c) or section 41.23, which is not receiving and has no commitment to receive HUD funding for the facility which is the subject of the capital grant, may apply to the commissioner to have the basis for computing depreciation on the facility include the facility's depreciable project costs which were funded with the capital grant. Such application must be submitted to the commissioner on or before September 30, 1986 on the forms prescribed by the commissioner. Such application shall be granted at the discretion of the commissioner upon a showing that inclusion in the depreciation basis of the facility's depreciable project costs which were funded with the capital grant is necessary to the financial

viability of the facility and will not impede the facility's efficient and economical operation. If the commissioner approves such application, the facility's rate shall be revised retroactive to April 1, 1986 to include in the depreciation basis the facility's depreciable project costs which were funded with the capital grant, and the provider shall enter into certain assurances described in clause (d) of this subparagraph. Upon full repayment of principal, the basis for depreciation for the facility will cease to include the amount of the capital grant. If the depreciable project costs are adjusted after audit, the basis for computing depreciation on the facility will be changed to such adjusted depreciation project costs.

- (v) Costs related to movable equipment, furniture and fixtures may be considered an allowable cost subject to the following:
 - (a) Depreciation based upon historical cost of movable equipment, furniture and fixtures is considered an allowable cost. The useful life shall be the higher of the reported useful life, or those from the Estimated Useful Lives of Depreciable Hospital Assets (1983 edition), published by the American Hospital Association, and available by writing to the American Hospital Association, 840 Lake Shore Drive, Chicago, IL 60611. A useful life that is based upon historical experience as shown by documentary evidence and approved by OMRDD may be allowed.
 - (b) The facility shall use the straight-line, double declining balance or sum of the years digits depreciation method. The depreciation method utilized must remain constant throughout the useful life of an asset.
 - (c) Lease payments may be an allowable cost if the payments are made under a lease which is an "arm's-length transaction" as described in subparagraph (iii) of this paragraph.
 - (d) Any personal property and equipment transactions shall be through a multiple bid process and entered into at a fair market value price.
 - (e) If the criteria in subparagraph (iii) of this paragraph are not met, reimbursement for lease costs will be the lower of lease costs or the amount determined in accordance with subparagraphs (iv) and (vii) of this paragraph.

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- (vi) Costs related to the Dormitory Authority of the State of New York as successor to the Facilities Development Corporation loans may be considered an allowable cost subject to the following:
- (a) The cost of principal and interest payments on loans from the Dormitory Authority of the State of New York as Successor to the New York State Facilities Development Corporation hereinafter referred to as (DASNY) pursuant to subdivision 13-d of section 5 of the Facilities Development Corporation Act, net of the portion of such payments attributable to operating costs, shall be an allowable cost; provided that the reimbursement of such costs is an allowance in lieu of reimbursement of interest and depreciation associated with the property and in lieu of reimbursement for the underlying allowable costs, which may include allowable start-up costs, for which the DASNY loan is received. A provider which receives an DASNY loan does not have the option of having included in the calculation of its rate, the loan's underlying costs instead of the loan principal and interest payments.
 - (b) Operational fees imposed by OMRDD and annual administrative fees imposed by MCFFA in connection with DASNY mortgage loans shall be an allowable cost.
- (vii) Interest cost may be considered an allowable cost subject to the following:
- (a) Interest, where the interest expense results from either start-up costs and/or the initial financing of the capital indebtedness and the capital indebtedness represents all or part of the current OMRDD and Division of the Budget approved value of the property after subtracting any equity contributions such as, but not limited to, grants applied to the subject property will be considered allowable; provided that in the case of interest payments on DASNY loans pursuant to subparagraph (vi) of this paragraph, interest for capital indebtedness and start-up costs will be considered allowable where interest expense results from capital indebtedness and start-up costs in an amount equal to the OMRDD and Division of the Budget approved value of the loan.
 - (b) An interest rate shall not be in excess of the amount a prudent borrower would pay at the time the loan was incurred. In the case of interest payments on DASNY mortgage loans pursuant to

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subparagraph (vi) of this paragraph, the allowable rate of interest shall be the rate set forth in the DASNY mortgage loan documents.

- (c) The loan agreement must be entered into between parties not related through control, ownership, affiliation or personal relationship as defined in clauses (iii)(c)-(f) of this paragraph, unless this provision is waived by the commissioner. Such waiver shall be based on, but not limited to, a demonstration of need for the program and cost savings resulting from the transaction.
- (d) Interest income generated from the facility's revenues for the operation of the facility shall be used to offset interest expense incurred during the same reporting period. Notwithstanding the foregoing, facility is not required to use the following to offset interest expense: income earned on qualified pension funds, income from gifts or grants which is donor-restricted, or income earned on secure investments pursuant to clause (iv)(d) or (e) of this paragraph.
- (e) Interest for capital indebtedness, as defined in clause (a) of this subparagraph where the interest expense results from the refinancing of the capital indebtedness, and the refinancing has the prior approval of the commissioner and the Division of the Budget, pursuant to subparagraph (ii) of this paragraph, will be allowed in that amount associated with the outstanding principal balance prior to refinancing; provided that in the case of interest payments on DASNY loans pursuant to the provisions of subparagraph (vi) of this paragraph, interest costs may be allowed in excess of the amount associated with the outstanding balance prior to refinancing, if the purpose of the debt is to acquire assets to be used for care of persons served by the facility and all other applicable requirements of this Part are met. Interest expense resulting from the inclusion of the reasonable closing costs, such as, but not limited to, attorney's fees, recording costs and points in the refinancing transaction will be considered allowable.
- (viii) Advance refunding costs incurred in connection with the refunding of bonds, and determined in accordance with generally accepted accounting principles, shall be considered allowable cost.
- (g) Trend factors.

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- (1) As appropriate, OMRDD shall apply trend factors to each facility's total reimbursable operating costs as determined by subdivision (c)-(f) and as submitted on the budget or cost reports required by section (a)(1)(i) and (ii) respectively. Except for educational and related services as defined at (3)(viii)(b)(3), such trend factors shall be applied to only reimbursable operating costs, with capital costs and start-up costs added to this result to compute the final rate.
 - (i) For all facilities, effective on the first day of the applicable fiscal cycle the trend factor utilized shall be that figure developed by the New York State Department of Health, incorporating the estimated current price movement for the applicable fiscal year for voluntary operated residential health care facilities. The following components of the statewide price movement for voluntary operated residential health care facilities are considered:
 - (1) Wages
 - (2) FICA
 - (3) Fringe Benefits
 - (4) OTPS
 - (ii) Each weighted element percentage shall be multiplied by the appropriate price index for each category noted above. (The term "weighted" shall mean the percentage derived by dividing each of the aforementioned elements of hospital and nursing home operating costs by the total operating cost.) For wages, the price index utilized is the United States Department of Labor Employment Cost Index (ECI-US). For fringe benefits, the price index utilized is the ratio of the ECI-US with fringe benefits to ECI-US without fringe benefits. For OTPS the price index utilized is the implicit Gross National Product Deflator. The sum of the products of all the weighted elements multiplied by their appropriate price index shall equal the trend factor.
 - (iii) A review of cost trends within the ICF/DD industry will be undertaken prior to the beginning of a rate period. Should such a review show that the previous trend factor did not accurately reflect the cost trends in the ICF/DD industry a substitution or supplementation may be made. Should the review show that the previous trend factor be sufficient to accurately reflect the actual rate of inflation in the period under review no substitution or supplementation will be made. For the rate periods beginning January 1, 1990, April 1, 1990 and July 1, 1990, two percent will be added to the 1990 component of the trend factor.

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For the rate periods beginning January 1, 1997, April 1, 1997 and July 1, 1997. 2.53 percent will be added to the 1997 component of the trend factor.

- (2) Where appropriate, the commissioner shall use some combination in whole or in part of the yearly components to project cost data into the appropriate rate period.

(h) Appeals to rates.

- (1) The commissioner will consider only the following appeals for adjustment to the rates which would result in an annual increase of \$1,000 or more in a facility's allowable costs, and are:

- (i) needed because of changes in the statistical information used to calculate a facility's staffing or utilization standards; or
- (ii) requests for relief from the standards contained in subdivisions (d) or (e) of this section which were applied to costs used in calculating the base period and subsequent period rates.
- (iii) Appeals for adjustments needed because of material errors in the information submitted by the facility which OMRDD used to establish the rate, or material errors in the rate computation.
- (iv) Appeals for significant increases or decreases in a facility's overall base period operating costs due to implementation of new programs, changes in staff or service, changes in the characteristics or number of individuals, changes in a lease agreement so as not to involve an affiliate, capital renovations, expansions or replacements which have been either mandated or approved by the commissioner and, except in life-threatening situations, approved in advance by the appropriate State agencies.

- (2) Notification of first level appeal.

- (i) In order to appeal a rate in accordance with subparagraphs (1)(ii-iii) of this subdivision, the facility must send to OMRDD an appeal application by certified mail, return receipt requested, either within 90 days of the facility receiving the rate computation or within 90 days of the beginning of the rate period in question, whichever is later.

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- (ii) In order to appeal a rate in accordance with subparagraphs (1)(i and iv) of this subdivision, the facility must send to OMRDD, within one year of the close of the rate period in question, a first level appeal application by certified mail, return receipt requested.
- (3) First level rate appeal applications shall be made in writing to the commissioner.
 - (i) The application shall set forth the basis for the first level appeal and the issues of fact. Appropriate documentation shall accompany the application and OMRDD may request such additional documentation as it deems necessary.
 - (ii) Actions on first level rate appeal applications will be processed without unjustifiable delay.
- (4) The burden of proof on the first level appeal shall be on the facility to demonstrate that the rate requested in the appeal is necessary to ensure efficient and economical operation.
- (5) A rate revised by OMRDD pursuant to an appeal shall not be considered final unless and until approved by the State Division of the Budget.
- (6) At no point in the first level appeal process shall the facility have a right to an interim report of any determinations made by any of the parties to the appeal. At the conclusion of the first level appeal process OMRDD shall notify the facility of any proposed revised rate or denial of same by certified mail, return receipt requested. OMRDD shall inform the facility that the facility may either accept the proposed revised rate or request a second level appeal in accordance with section 602.9 of this Title in the event that the proposed revised rate fails to grant some or all of the relief requested.
- (7) If OMRDD approves the revision to the rate and State Division of the Budget denies the revision, the facility shall have no further right to administrative review pursuant to this section.
- (8) Any rate revised in accordance with this subdivision shall be effective according to the dates indicated in the rate appeal notification.
- (9) Any additional reimbursement received by the facility, pursuant to a rate revised in accordance with this subdivision, shall be restricted to the specific purpose set forth in the appeal decision.
- (10) Second level appeals to rates.

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- (i) OMRDD's denial of the first level appeal of any or all of the relief requested in the appeals provided for in paragraph (1) of this subdivision shall be final, unless the facility requests a second level appeal to the commissioner in writing within 30 days of service of notification of denial or proposed revised rate.
 - (ii) Second level appeals shall be brought and determined in accordance with the applicable provisions of 14 NYCRR Part 602.
- (i) Reserve bed days for overnight absences for hospitalization or leaves of absence in facilities.
- (1) Payment.
- (i) Payment for overnight absences due to hospitalization shall be in accordance with 18 NYCRR section 505.9.
 - (ii) Payment for overnight absences due to leaves of absence shall be in accordance with 18 NYCRR section 505.9 and the following additional requirements.
 - (a) A leave of absence due to visits with relatives or friends, must not be medically or programmatically contraindicated.
 - (b) In the case of a leave of absence due to medically acceptable therapeutic leave or rehabilitative plans of care, the plan of care must be documented.
 - (c) Leaves of absence covered under the bed reservation program must be provided for in the consumer's individual program plan as designated by the interdisciplinary team.
 - (d) Such planning should most appropriately take place during the development and monitoring process of the individual program plan during the quarterly and annual reviews. A consumer's assigned bed cannot be reserved if another person is occupying that bed.
- (2) Reporting.
- (i) Each facility shall maintain an absence register for each consumer who is absent overnight.

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- (ii) The facility shall record the duration and purpose of each absence and make an annotation indicating whether or not the consumer's bed was reserved.
- (iii) Each month the facility shall complete a report summarizing all consumer absences and submit the report to OMRDD. The facility shall submit the report to the consumer's sponsoring local social services district within ten working days following the end of the month. This report shall reflect the information contained in each consumer's absence register.
- (iv) The facility shall report reserve bed absences in the form and format as prescribed by the commissioner.

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